(1) Supreme Court U.S.
F I

041053 JAN 28 2005

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT

Petitioner,

v.

A&W INDUSTRIES, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
(Volume I)

Frank P. Hernandez
Counsel of Record
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (Fax)
E-mail: fgeagle@aol.com
TCB# 09516000
Attorney for Petitioner

QUESTION PRESENTED

The 5th Circuit affirmed a Bankruptcy Court's exception to discharge under §523(a)(6) by collateral estoppel of a state court judgment for civil conspiracy to breach a contract in favor of a creditor who has judicially admitted that the debtor never engaged in either negligent, unlawful or criminal behavior resulting in injury to the creditor. The record shows that that the debtor never had any contractual relationship with or legal duty to the creditor, and could not and did not participate in any action alleged by the creditor to be a conspiratorial act directed toward the creditor. The state court failed to find any illegal act by any alleged conspirator that is a required element of civil conspiracy in Texas. The Bankruptcy Court based its decision on a similarly flawed state appeals court opinion that impermissibly "implied" both facts and damages from the original state court judgment when, under Texas law, such facts and damages cannot be implied.

No case exists in the 1st, 5th, 6th, 9th, and 10th circuits that has held any participant in a civil conspiracy to be non-dischargeable under §523(a)(6). No case exists in any circuit in which a third party with no direct relationship to the creditor has been found to be non-dischargeable under §523(a)(6). Conversely, business and marital partners have been granted discharge when evidence showed they did not participate in their partners' non-dischargeable actions. Further, individuals with direct relationships to creditors have been found to be dischargeable because collateral estoppel has been declared inappropriate, their states of mind were not determined in the trial court, or because the ultimate determination of dischargeability is a federal question. All of these elements exist in this case.

The Bankruptcy Court decision in this case conflicts directly with its own court, decisions in the Northern District of Texas, the Fifth Circuit, other circuits and this Court.

Aside from the public policy issue this case raises of disregarding the specific, and narrow, language of the statute to include debtors who may have no direct relationship with the creditor, this case concerns a single question:

Can a state court judgment debt be held non-dischargeable under §523(a)(6) on the basis of a state court finding of civil conspiracy when the creditor judicially admitted that the debtor did not engage in either negligent, unlawful or criminal behavior resulting in injury to the creditor, and the debtor did not participate in any act claimed by the creditor to have caused the creditor's alleged injury?

LIST OF PARTIES

Appellant certifies that the following persons may have an interest in the outcome of this case:

1. Kenneth A. Goldblatt, Petitioner.
2. Frank P. Hernandez, Petitioner's Counsel of Record.
3. A & W Industries. Inc., Respondent.
4. Frank R. Jelinek, Respondent's Counsel of Record.

CORPORATE DISCLOSURE STATEMENT

Respondent A&W Industries, Inc. is a privately held Texas corporation.

THIS PAGE LEFT INTENTIONALLY BLANK

TABLE OF CONTENTS

Page(s)

Volume I

Question Presented i
List of Parties iii
Table of Contents v
Table of Authorities vii
Opinions Below 1
Statement of Jurisdiction 1
Applicable Statutes 1
Statement of the Case 1
Statement of the Facts 2
Reasons for Granting the Writ 5
Standard of Review 10
Summary of Argument 10
Argument 11
- Willful & Malicious Injury 12
- By the Debtor 12
- Justification or Legal Excuse 12
- The Injury Requirement 13
- Supreme Court Authority 16
- Texas Law and the Bankruptcy Court Judgment 17
- Northern District Bankruptcy Law 19
- 5th Circuit Case Law 21
- Other Circuits' Authority 26
  - 1st Circuit 26
  - 6th Circuit 27
  - 9th Circuit 27
  - 10th Circuit 28

Conclusion 29
Certificate of Service 31

Volume II

Table of Contents i

Appendix A

Summary Judgment of Probate Court No. 2,
Tarrant County, Texas
May 27, 1997 1

Appendix B

Excerpt: Reporter's Record, Probate Court No. 2,
July 28, 1999 3

Appendix C

Judgment of Probate Court No 2,
Tarrant County, Texas
May 11, 2000 11

Appendix D

Findings Of Fact And Conclusions Of Law
of the Probate Court No. 2, Tarrant County, Texas
May 31, 2000 19

Appendix E

Opinion of the Court of Appeals
Second District of Texas
July 18, 2002 25

Appendix F

Denial of Rehearing, Supreme Court of Texas
May 15, 2003 113

Appendix G

Excerpt: Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits (filed in the Bankruptcy Court, Northern District of Texas)
September 11, 2002 115

Appendix H
Memorandum Opinion
Bankruptcy Court of the Northern District of Texas
November 7, 2002 117
Appendix I
Order On Plaintiff's and Defendant's Motions for Summary Judgment
Bankruptcy Court of the Northern District of Texas
November 25, 2002 141
Appendix J
Order Denying Reconsideration
Bankruptcy Court of the Northern District of Texas
December 6, 2002 145
Appendix K
Final Judgment,
U.S. District Court for the Northern District of Texas
March 24, 2004 147
Appendix L
Notice of Appeal
April 11, 2004 149
Appendix M
Judgment
Fifth Circuit Court of Appeals
November 4, 2004 151

THIS PAGE LEFT INTENTIONALLY BLANK

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Carrillo v. Su (In re Su).....9, 27
290 F.3d 1140 (9th Cir. 2002)

Chase Manhattan Bank, N.A. v. Ford (In re Ford).....18
186 B.R. 312 (Bankr. N.D. Ga. 1995)

Chevy Chase Bank, FSB v. Briese (In re Briese).....18
196 B.R. 440 (Bankr. W.D. Wis. 1996)

Corley v. Delaney (In re Delaney).....22
97 F.3d 800 (5th Cir. 1996)

Firstmark Fin. Corp. v. Aldrich (In re Aldrich).....26
37 B.R. 860 (Bankr. N.D. Ohio)

Gleason v. Thaw.....24
236 U.S. 558, 35 S.Ct. 287, 59 L.Ed. 717 (1915)

Hamilton v. Nolan (In re Nolan).....8, 26
220 B.R. 727 (Bankr. D.C. 1998)
No. 03-8010 (6th Cir. 2004)

Hickman v. State of Texas.....5, 7, 23
260 F.3d 400 (5th Cir. 2001)

Huckabay v. Moore.....9, 23, 28-29
142 F.3d 233 (5th Cir. 1998)

In re Caton.....23
157 F.3d 1026 (5th Cir. 1998)

In re Colcazier.....25
134 B.R. 29, 33 (Bankr. W.D. Okl. 1991)

In re Cook.....6, 7, 23
169 F.3d 271 (5th Cir. 1999)

In re Courtland Corp.....12
967 F.2d 1069 (5th Cir.), 23 BCD 544,
CCH Bankr. L. Rptr. 74817

In re Debtor (Miller) 6, 21-22
156 F.3d 598, 48 U.S.P.Q.2d 1293
(5th Cir. 09/24/1998)

In re Garner 23
56 F.3d 677 (5th Cir.1995)

In re Greenway 23
71 F.3d at 1180 n.8

In re Grisham (Mabank Bank v. Grisham) 6, 19-20
N.D.Tex. 2000), 245 B.R. 65,
43 Collier Bankr.Cas.2d 1352

In re Jerich (Petralia v. Jercich) 9, 25, 27
238 F.3d 1202 (9th Cir. 2001)

In re Keaty (Raspanti v. Keaty) 25
2005 WL 57312 (5th Cir. 2005)

In re Meece 6, 11, 20-21, 27
261 B.R. 403 (N.D.Tex. 2001)

In re Moore v. Panalis 9, 28
357 F.3d 1125 (10th Cir. 2004)

In re Quezada 23
718 F.2d 121 (5th Cir. 1983)

In re Riso 25
978 F.2d 1151, 1154 (9th Cir. 1992)

In re Trantham 8, 27
No. 03-8010 (6th Cir. 2004)

In re Williams 7, 23-25
337 F.3d 504 (5th Cir. 2003)

Jones v. Svreck (In re Jones) 8, 26
MW 02-44 (1st Cir. 2003)

Kawaauhau v. Geiger 16, 17, 20-22, 24, 25
523 U.S. 57, 118 S.Ct. 974,
140 L.Ed.2d 90 (1998)

Marine Shale Processors, Inc. v. EPA 21
81 F.3d 1371 (5th Cir. 1996)

Miller v. J. D. Abrams, Inc. (In re Miller)...20, 22, 24, 26
156 F.3d 598 (5th Cir.1998), cert. denied, 526 U.S. 1016, 119 S.Ct. 1249, 143 L.Ed.2d 347 (1999)

Morales v. Trans World Airlines, Inc. 17
504 U.S. 374 (1992)

Petty v. Dardar (In re Dardar) 22
620 F.2d 39 (5th Cir. 1980)

Seven Elves, Inc. v. Eskenazi 22
704 F.2d 241 (5th Cir. 1983)

Shalilesh Gupta v. Eastern Idaho Tumor Institute, Inc. (In re Shailesh Gupta). 2, 7-8
2004 WL 2913963 (5th Cir. 2004)

Texas v. Walker 6, 21, 25
142 F.3d 813, 126 Ed. Law Rep. 92 (5th Cir. 1998)

U.S. Dept. of the Treasury v. Fabe 19
508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993)

Vickers v. Home Indem. Co. 22
546 F.2d 1149 (5th Cir. 1977)

Voss v. Tompkins (In re Tompkins) 8, 26
290 B.R. 194 (Bankr. W.D.N.Y. 2003)

Texas Cases

Avary ex rel. Estates of Bourgeois v. Bank of America, N.A. 18
2002 WL 442064 (Tex.App.Dallas, 2002)

City Products Corp. v. Berman 13
610 S.W.2d 446 (Tex.1980)

Firestone Steel Products Co. v. Barajas 18
927 S.W.2d 608 (Tex. 1996)

Juhl v. Airington 18
936 S.W.2d 640 (Tex. 1996)

Massey v. Armco Steel Company 13
652 S.W.2d 932 (Tex. 1983).

Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp. 18
435 S.W.2d 854 (Tex.1968)

Tex. Nat'l Bank v. Karnes 19
717 S.W.2d 901 (Tex. 1986)

Triplex Communications, Inc. v. Riley 15
900 S.W.2d 716 (Tex. 1995)

Victoria Bank & Trust v. Brady 12
811 S.W.2d 931 (Tex. 1991)

Ward v. Sinclair 17
804 S.W.2d 929 (Tex. App. – Dallas 1990)
writ denied)

Treatises

1A Collier, Bankruptcy 17.17 22
1650.4 to 1650.6 (1976))

Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate* 26
59 Geo. Wash. L. Rev. 56, 61-89 (1990)

Karen N. Fischer, Comment, *The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice* 26
7 Bankr. Dev. J. 245, 248-59 (1990)

Statutes

U.S. Bankruptcy Code §523(a)(6).....*passim*
Fed. R. App. P. 28(a)(9).....23

THIS PAGE LEFT INTENTIONALLY BLANK

OPINIONS BELOW

The Bankruptcy Court denied Goldblatt's discharge claim on November 7, 2002. [Appendices H and I] and denied his Petition for Reconsideration on December 6, 2002. [Appendix J] The Order of the District Court affirming the Bankruptcy Court was issued on March 24, 2004. [Appendix K] Goldblatt filed Notice of Appeal on April 11, 2003. [Appendix L] The unpublished, *per curiam* Opinion of the 5th Circuit affirming the Opinion of the District Court was issued on November 4, 2004. [Appendix M]

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. Sec. 1254(1) and 2101(c). The date of the last judgment sought to be reviewed is November 4, 2004. The judgment from which Appellant appealed to the Fifth Circuit was conferred by 28 U.S.C. § 158(a)(1). Jurisdiction for Appellant's appeal to the federal district court was conferred by 28 U.S.C. § 158(a)(1) and/or (a)(2). The original matter in the bankruptcy court was a core matter under 28 U.S.C. §§ 157(b)(2)(I) and (J) and 1334.

APPLICABLE STATUTES

Bankruptcy Rule 523(a)(6) states in pertinent part: "(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – .... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

STATEMENT OF THE CASE

This is a Federal Bankruptcy Discharge case.

Petitioner Goldblatt ("Goldblatt") asserts the Bankruptcy and appeals Courts' clear error in denying his discharge of a factually flawed state court judgment debt.

This case involves four seminal issues:

The first issue is the bankruptcy court's denial of discharge based on collateral estopple of a state court judgment is proper when the findings accompanying that judgment do not support either the original trial court judgment or the requirements of § 523(a)(6). *Shalilesh Gupta v. Eastern Idaho Tumor Institute, Inc.* (*In re Shailesh Gupta*) 2004 WL 2913963 (5th Cir. 2004) indicates collateral estoppel is inappropriate.

The second issue is the Bankruptcy Court's reliance on an unpublished, 88-page state appeals court opinion that is both factually flawed and legally erroneous and inappropriate for collateral estoppel. That opinion [Appendix E] recites conflicting facts that make it legally and chronologically impossible for Goldblatt to have participated in a conspiracy and that court impermissibly and unlawfully "implied" missing facts while quoting the very Texas authority that prohibits it from doing so.

The third issue is the Bankruptcy Court's reliance on Texas law regarding the basis of the disputed debt, rather than applying Federal bankruptcy law principles and authorities as required by existing authority of its own court, its own district, its own circuit, other circuits, and this Court. *Gupta* at [hn. 3] and [¶ 8]. ("the ultimate determination of dischargeability . . . is a federal question.").

The fourth issue is that the 5th Circuit's unpublished, *per curiam* affirmation of the Bankruptcy Court's judgment that conflicts with its own circuit's law and those of other circuits.

STATEMENT OF THE FACTS

In 1985, the president of a Texas corporation, mortgaged real estate and assets of the corporation through a mortgage and deed of trust. [Appendix E, p. 31]. In 1989, a dispute developed between family members, over the ownership of the capital stock of the corporation and the mortgaged assets. The dispute resulted in a lawsuit filed in

Texas' 352nd District Court, where the parties agreed to a temporary injunction to prevent the business or its assets from being sold except as business had been conducted in the past. A&W Industries, Inc. ("A&W") was not a party to the 1989 lawsuit and did not exist as a business entity at the time.

In June 1990 the company president was murdered. [Appendix E, p. 27]. His executors were substituted as plaintiffs in the 352nd Court suit. [Appendix, E, p. 27]. Attorneys for the Estate told the Executors that the company had to be sold to pay Federal taxes, convincing the executors to sell the company's assets to A&W. The representations were false. [Appendix E, p. 28, fn. 2].

Because the Creditor was aware of the 1985 mortgage and the existing lawsuit, it did not purchase the real estate along with the other business assets. Instead, A&W executed a 5-year Commercial Lease Agreement ("the Lease") with the corporation containing an Obligation to Purchase section ("Section 28") providing that, the Creditor would purchase the property for $327,000.00 if the lessor could offer clear title during the lease term. [Appendix E, p. 30]. However, the contingencies of Section 28 were never triggered because the real estate title was never "clear." [Appendix E, p. 34, fn. 4].

During the summer of 1993, A&W declared it was ready to purchase the subject real estate but offered $95,000.00, less than one-third of the originally agreed price. [Appendix E, p. 36]. The Executors refused the offer. A&W stopped paying rent, precipitating notice of default on the note.

The executors discovered the problems caused by the Estate's and WNT's attorneys' malfeasance, fired them, halted the sale process on November 27, 1993 [Appendix E, p. 36], and demanded A&W resume making its rental payments.

In early 1994, a 352nd court party, Shirley Long, filed a new suit against the Executors and the corporation

in the 48th District Court, for breach of the 352nd court judgment. [Appendix E, p. 37]. In February 1994, Executor James Day, contacted Goldblatt to assist the executors in obtaining information regarding the property and to gain his assistance to stop foreclosure. [Appendix E, p. 37]. On February 28, 1994, Goldblatt purchased the mortgage. [Appendix E, p. 38]. On March 28, 1994, A&W sued the Estate and Goldblatt alleging conspiracy to prevent A&W from purchasing the subject real estate by breaching the Obligation to Purchase Agreement contained in Section 28 of the Commercial Lease Agreement of 1991. [Appendix E, p. 38]. The Executors, on advice of their new counsel, notified Goldblatt that they could not meet the mortgage payments because of A&W's lawsuit. Goldblatt responded by notifying them of default and instituting new foreclosure proceedings.

On May 30, 1994, Goldblatt entered agreements with all of the parties to the 352nd court suit to settle all original disputes and defend against A&W's pending lawsuit. [Appendix E, p. 39] These agreements rendered the 48th court judgment moot.

On June 7, 1994, Goldblatt properly and validly foreclosed the note. [Appendix E, p. 41] The Bankruptcy Court erroneously stated that Goldblatt foreclosed on the note because A&W had sued him. His testimony at trial showed otherwise:

> Q. The fact is, you didn't want to do it because you needed to foreclose because you believed it would cut off A&W's claims to purchase, correct?
>
> A. No, sir.

In refusing to alter the 1997 Summary Judgment, the probate judge stated on the record:

> Now, as to the matter of the constructive trust, the Court has wrestled with this issue throughout the trial, and I'm of the belief that in order for the Court to invoke that remedy, there must be clean hands on the part of the party requesting it. And I just find that Ms. Rountree's testimony was so

> lacking, and so lacking in credibility, and that the lease was obviously violated. I think that if they had a lease, they should have been careful to pay the taxes. They should have observed the letter of the lease given the circumstances they were in, and I'm going to deny the constructive trust." [Appendix B, p. 9]

and then stated:

> The Court having previously found that Mr. Goldblatt's foreclosure was valid, the Court will not affect that. [Appendix B, p. 10]

REASONS FOR GRANTING THE WRIT

This is a case of first impression. Goldblatt has found no case in any circuit in which an accused "conspirator" who did not act directly to injure the judgment creditor or who did not have a direct relationship with the creditor has been denied discharge under §523(a)(6). Neither has Goldblatt found any case in which the debtor has been held to be non-dischargeable after the creditor has judicially admitted that it never claimed the debtor engaged in either negligent, unlawful, or criminal behavior that injured the creditor. Yet, both elements are present in the record of this case.

Most circuits acknowledge that §523(a)(6) obligates reviewing panels to construe strictly exceptions to discharge to give effect to the fresh start policy of the Bankruptcy Code. See *Hickman v. State of Texas*, 260 F.3d 400 (5th Cir. 2001). But the Bankruptcy and appellate courts below have erroneously sanctioned the application of state law over Federal law when case law authorities require the opposite.

Most important, however, the original decision of the Bankruptcy Court conflicts with holdings in its own district, the 5th Circuit, and other circuits that have considered §523(a)(6), as well as this Court.

In *In re Grisham*[1] the court affirmed that debt arising from debtor's conduct would not be 'malicious' within the meaning of the discharge exception when a debtor has just cause or excuse."[2] In *In re Meece*[3], the court declared that a debt arising from the debtor's infliction of an intentional injury is dischargeable if the debtor had just cause or excuse. The *Meece* court found trial court findings that precluded exception under §523(a)(6) just as the findings do in this case.

The Bankruptcy Court's decision also conflicts with §523(a)(6) 5th Circuit law. In *Texas v. Walker*[4] the panel declared that "[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances" and that the absence of any evidence in the state trial court of the debtor's state of mind [as in this case] required reversal and remand. The *In re Debtor* [*Miller*][5] panel found that the scope of the collateral estoppel doctrine is circumscribed by the particularized findings in the case, reasoning that "the label 'intentional tort' is too elusive to sort intentional acts that lead to injury from acts intended to cause injury," and reversing and remanding for further proceedings. In *In re Cook*[6] the panel agreed that the absence of evidence that Mrs. Cook participated in the activities about which the creditor complained allowed her discharge – even when her husband's discharge was denied under the same facts. The *Cook* panel found that the

---

[1] *In re Grisham* (*Mabank Bank v. Grisham*), (N.D.Tex. 2000), 245 B.R. 65, 43 Collier Bankr.Cas.2d 1352.

[2] Although Grisham was decided two years after *Kawaahau*, there continues to be some confusion in the 5th Circuit as to the just cause or excuse defense.

[3] *In re Meece* 261 B.R. 403, 406-407 (Bankr. W.D.Tex. 2001.

[4] *Texas v. Walker*, 142 F.3d 813, 126 Ed. Law Rep. 92 (5th Cir. 1998).

[5] *In re Debtor* [*Miller*], 156 F.3d 598, 48 U.S.P.Q.2d 1293 (5th Cir. 1998).

[6] *In re Cook*, 169 F.3d 271 (5th Cir. 1999).

creditor had abandoned its objections to Mrs. Cook's discharge in pleadings, just as in this case. In *Hickman v. State of Texas*[7] the panel acknowledged its duty to construe exceptions narrowly in favor of the debtor and limited the scope of the term "willful and malicious injury" to "conduct designed to cause deliberate or intentional injury" and not merely intentional conduct that resulted in injury. The *In re Williams*[8] panel concluded that the provision applies to "acts done with the actual intent to cause injury," but excludes intentional acts that cause injury.

Walker, *Miller*, and *Williams* (and the cases they cite) all involve fact situations in which each discharged judgment debtor was personally involved in a direct relationship with the judgment creditor. In *Cook*, even a relationship of marital partners was not sufficient to overcome the "by the debtor" language of the statute. *Hickman* underscored the requirement to construe the language of the statute narrowly. More important, however, is the fact that after the 5th Circuit panel in this case issued its unpublished, *per curiam* decision, another 5th Circuit panel issued a conflicting opinion holding that the state court findings did not effectively determine the dischargeability of a state court judgment under a similar section of the Bankruptcy Code, saying that "the ultimate determination of dischargeability . . . is a federal question." It pointed out that no "finding" was made in the state court, and, collateral estoppel cannot attach to a non-existent finding." The *Gupta* panel recognized that, "there is no way to tie the damages found . . . back to specific instances of [the debtor's] misconduct that might correlate with Texas's amended statute or the federal standard" and reversed and remanded. See *Shailesh Gupta v. Eastern*

---

[7] *Hickman v. State of Texas*, 260 F.3d 400 (5th Cir. 2001).
[8] *In re Williams*, 337 F.3d 504 (5th Cir. 2003).

Idaho Tumor Institute, Inc. (*In re Shailesh Gupta*) 2004 WL 2913963 (5th Cir. 2004).[9]

Most important, however, the decisions in this case conflict with those of other circuits.

The 1st Circuit has sorted difference between actions "by the debtor" through two applicable decisions. In *Jones v. Svreck*[10] a panel held that Jones' sexual harassment of Svreck was non-dischargeable because there was evidence showing Jones' actions were intentional and that he intended the injury. It distinguished the *Jones* facts from *Hamilton v. Nolan*[11] in which Nolan was granted discharge because Nolan was not the individual who engaged in the discriminatory treatment. The *Nolan* panel stated that "even if [the perpetrator's] behavior were found to be willful and malicious, this could not be imputed to debtor Nolan."[12] *Nolan* at 731.

In the 6th Circuit, the *In re Trantham*[13] panel found patent infringement action created a non-dischargeable debt because Trantham had no justification for his actions.[14]

A 9th Circuit panel interpreted *Kawaauhau* in declaring that §523(a)(6)'s malicious prong was separate and distinct from its willful prong and characterized a malicious injury as involving "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4)

---

[9] See also *In re Moore v. Panalis*.

[10] *Jones v. Svreck* (*In re Jones*), MW 02-44 (1st Cir. 2003)

[11] *Hamilton v. Nolan* (*In re Nolan*), 220 B.R. 727, 730 (Bankr. D.C. 1998)

[12] The panel further distinguished *Jones* from *Voss v. Tompkins* (*In re Tompkins*) 290 B.R. 194, 199 (Bankr. W.D.N.Y. 2003) in which the judgment entered did not indicate that the underlying causes of action in the complaint were valid or had been admitted by the debtor, thus precluding application of collateral estoppel.

[13] *In re Trantham*, No. 03-8010 (6th Cir. 2004)

[14] The Court may find it useful to compare *Trantham* with *Meece*, in which one infringer was found to be non-dischargeable while the other one was discharged.

is done without just cause or excuse." There, a debtor who had the clear ability to pay employee wages, but chose not to pay and inflicted willful and malicious injury for personal benefit. See *Petralia v. Jercich*[15]. The *Carrillo v. Su*[16] panel reaffirmed *Jercich,* holding that the §523(a)(6) willful injury requirement is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." The *Su* panel upheld a BAP reversal of the bankruptcy court because "the subjective standard correctly focuses on the debtor's state of mind and precludes nondischargeability short of the debtor's actual knowledge that harm to the creditor was substantially certain." The *Su* court found the bankruptcy court erroneously "conflated" the "willful" and "malicious" prongs in its §523(a)(6) analysis – just as was done in this case.

In the 10th Circuit, in *In re Moore v. Panalis*[17], the bankruptcy court ruled for Moore, holding that a fraud verdict did not represent a debt for a "willful" injury under §523(a)(6). The 10th Circuit panel reasoned that "it does not follow that everything that happens to the victim following the commission of the tort was intended by the tortfeasor" and found the district court's analysis of the malicious requirement incomplete stating: "The code must govern the outcome here." *In re Moore* at 1129. The Bankruptcy Court's error here is identical to that of the original *Moore* bankruptcy court.

Goldblatt comes to this Court for correction of a travesty resulting from cascading misinterpretations of fact and conflicting and unlawful legal conclusions that have caused a landslide of injustice. Manifest abuses of discretion and errors by the courts below have abridged Goldblatt's state and Federal constitutional rights of

---

[15] *Petralia v. Jercich*, 238 F.3d 1202, 1208 (9th Cir. 2001).
[16] *Carrillo v. Su* (*In re Su*), 290 F.3d 1140 (9th Cir. 2002).
[17] *In re Moore v. Panalis*, 357 F.3d 1125 (10th Cir. 2004)

property and due process. Justice and equity require his writ of certiorari be granted to correct what amounts to an avalanche of errors.

STANDARD OF REVIEW

On appeal of a bankruptcy proceeding, a two-level standard of review is required:

1) Factual findings of bankruptcy court are reviewed under a "clearly erroneous" standard, and are overturned only when the reviewing court is left with firm and definite conviction that the bankruptcy court committed a mistake,

2) Legal conclusions of the bankruptcy court are reviewed under less deferential "*de novo* standard", and, if bankruptcy court premises findings of facts on an improper legal standard, such findings of facts lose the insulation of the protection of the clearly erroneous rule.

The decision of the Court of Appeals is reviewed for abuse of discretion. Discretion is abused if the ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

SUMMARY OF ARGUMENT

The black letter law of the Bankruptcy Code requires an act "by the debtor" for exception to discharge. No court has found Goldblatt participated in any act that harmed, or was intended to harm, the A&W. A&W has judicially admitted in its Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits that it has never claimed that Goldblatt engaged in either negligent, unlawful or criminal behavior. [Appendix G, p. 116] This admission alone renders the subject debt dischargeable since the Code (and all relevant authorities) require an act "by the debtor."

The black letter law of the Bankruptcy Code also requires that the act by the debtor to be both "willful and malicious." No evidence exists on the record to show that

Goldblatt committed any act that was either "willful" or "malicious" as those terms are defined by bankruptcy authorities in- and outside the 5th Circuit – or any other circuit. Conversely, evidence exists that demonstrates conclusively that Goldblatt had a legal justification for the actions he personally took.

Trial court decisions in the Northern District of Texas require "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *In re Meece*, 261 B.R. 403, 406-407 (2001) This Court has held specifically that a debtor's action must be both willful and malicious and that the requirement of malicious action cannot be read out of the statute. The creditor must establish either an objective certainty of harm or a subjective motive to cause harm, performed "without just cause or excuse." Just cause or legal excuse overcomes objection to discharge.

Case law of every circuit shows that actions by others are never attributed to a debtor for the purposes of exception to discharge. It further shows that willful conduct is not sufficient by itself to sustain an objection to discharge and that malicious conduct is measured by "objective" or "subjective" legal tests. Case law rejects the kind of incomplete analysis the Bankruptcy Court made in this case.

ARGUMENT

Proper analysis of this case must begin with the language of §523(a)(6) which states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt – .... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

Willful and Malicious Injury

Willful and malicious injury assumes an act by a debtor carrying either an objective certainty of harm or a subjective motive to cause harm. Implicit, however, in either of these tests is the requirement that the debtor actually perform the unlawful act. Courts at all levels where the issue has been adjudicated have held that "and malicious" cannot be read out of the statute and have held that "malicious" assumes an act "without just cause or legal excuse."

By the Debtor

The Creditor has judicially admitted[18] in its Plaintiff's Response to Defendant's Motion for Summary Judgment with Cross Motion for Summary Judgment and Supporting Affidavits in the Bankruptcy Court that it "has never claimed that the defendant [Goldblatt] engaged in either negligent, unlawful or criminal behavior." [Appendix G, p. 116]. If Goldblatt did not engage in unlawful behavior he could not have committed any tort – much less an intentional one – that would meet the requirements of §523(a)(6).

Justification and/or Legal Excuse

Goldblatt had more than one just cause for the actions taken:

In Texas, one is privileged to interfere with another's contractual relations (1) if it is done in a *bona fide* exercise of his own rights, or (2) if he has an equal or superior right in the subject matter. *Victoria Bank & Trust v. Brady*, 811 S.W.2d 931, 939-40 (Tex. 1991). Goldblatt had both.

1) Goldblatt validly foreclosed a note made prior to the existence of A&W. A&W was a stranger to that note,

---

[18] Only deliberate, clear and unequivocal statements can constitute conclusive judicial admissions. *In re Corland Corp.* (CA5 Tex) 967 F2d 1069, 23 BCD 544, CCH Bankr L Rptr 74817.

and Goldblatt had no relationship with, nor duty to, A&W under the note or any other agreement. Goldblatt's foreclosure cut off A&W's rights and obligations to purchase the subject real estate as a matter of law. Therefore, Goldblatt's legal justification is clear and legally cognizable.

2) Goldblatt had a legal right to protect himself. A&W peremptorily sued Goldblatt on March 28, 1994, over two months prior to the foreclosure, and before any alleged conspiratorial act involving Goldblatt alleged by the Creditor. Goldblatt's actions were in defense of that suit.

3) The Agreement of May 30, 1994 between all of the parties to the 352nd court suit was to defend against A&W's claim and as a family settlement agreement – both legal under Texas law. It was not directed toward A&W. An agreement to resist a claim is not an actionable civil conspiracy without an unlawful, overt act in furtherance of the conspiracy. *Massey V. Armco Steel Company*, 652 S.W.2d 932, (Tex. 1983). The probate court found none. The Agreement of May 30, 1994 referenced professionals' breaches of fiduciary duty in the sale of company assets, not any action against A&W. [19]

The Injury Requirement

In Texas, a plaintiff must prove a "distinct," separate, tortious injury with actual damages arising from that injury to establish conspiracy. *City Products Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex.1980). The probate court found no such separate and distinct injury nor tort damages. [Appendix D, *passim*]

---

[19] The subsequent payment by all involved professionals' insurance companies of the limits of their professional malpractice insurance policies establishes that the Executors' and Goldblatt's beliefs of malfeasance and suspicions of malpractice were based on reasonable grounds and equally establishes that they had probable cause and legal justification for their actions in participating in their May 30, 1994 Agreement.

A&W alleged three bases for its conspiracy claims:

1. Purported warranties of a 1991 Bill of Sale.
2. A false 1994 affidavit filed in the 48th court action.
3. The May 30, 1994 Agreements.

None of these can be applied to Goldblatt.

The Bill of Sale was executed in October 1991 by A&W's Secretary-Treasurer while she acted simultaneously as a vice president of the Estate-owned selling corporation – when A&W's principals knew of the 352nd court dispute, fully 28 months before Goldblatt became involved.

The state appeals court opinion shows that A&W could not have been damaged by the 48th court's judgment. [Appendix E, p. 95] The Opinion states:

> "A&W was not in privity with any of the parties to the 48th court lawsuit. A&W did not control the 48th court suit, its interests certainly were not represented by any party to the 48th court suit and it was not a successor in interest to any of the parties to the 48th court suit." [Appendix E, p. 94-95]

and

> "While A&W may not have had standing to challenge the effect of the 48th court judgment on the parties to that lawsuit, it could certainly assert below that it was not bound by the 48th court judgment." [Appendix E, p. 96 (fn. 18)]

Goldblatt was sued before he even contemplated the Agreements of May 30, 1994.

Therefore, the Bankruptcy Court simply and clearly erred in adopting the flawed and contradictory analysis of the Opinion that "Goldblatt 'wrongfully and intentionally conspired to inflict injury on A&W." [Appendix E, p. 128, (Memorandum Opinion, p. 9, quoting Judgment, p. 2)] It just as clearly erred when it concluded that "Goldblatt, at the very least, had full knowledge of all the details of the

conspiracy." [Appendix H, p. 129 (Memorandum Opinion, p. 10, quoting Opinion, p. 35)] Without paranormal psychic abilities, Goldblatt could not have known about activities taking place years and months before he became involved in the facts. At the date of the breach on which A&W's claims are based:

1) Goldblatt was unaware of the problems of the Estate, and had not purchased the note. [Appendix E, p. 37].

2) No claim regarding the breach of the 352nd court judgment had been (or ever was) asserted to affect A&W. [Appendix E, p. 37].

3) Goldblatt had not met any parties involved in the 352nd court suit except James Day or even knew of its existence.

4) Suit had not been filed in the 48th court and Goldblatt was never a party to the suit nor participated in the suit in any way. [Appendix E, p. 37].

5) The 48th court motion for summary judgment had not been filed. [Appendix E, p. 38].

6) There was no agreement among any of the parties of the 352nd court suit to do anything – their disagreements (and concomitant litigation) of the previous five years were ongoing. [Appendix E, p. 39].

7) And Goldblatt had not begun investigating the circumstances of the claims of the Estate, its corporation or A&W and did not do so until after A&W sued him.

The gist of civil conspiracy is the injury intended. One can not agree either expressly or tacitly to the commission of a wrong of which he does not know. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex.,1995) The record clearly shows that there could have been no meeting of the minds of the alleged conspirators on or before November 27, 1993. While it is true that Goldblatt brought the warring Estate parties together through the Agreements of May 30, 1994, he did so after (and because) A&W had filed suit alleging "conspiracy" and at a time when such action was protected as an

agreement to defend a claim and a legal family settlement agreement.

A&W's theory that the object of the conspiracy was to breach the Obligation to Purchase Agreement contained in Section 28 was an attempt to twist the facts to fit its original, faulty allegations. Goldblatt was never a party to the Agreement for Acquisition of Assets or the Lease. More important, however, is the fact that the contingencies of Section 28 never triggered formation of a sale contract because the property title was never clear – as the appeals court Opinion shows. [Appendix E, p. 34, (fn. 4)]. As holder of the 1985 mortgage, Goldblatt had legal rights superior to A&W's as a matter of law.

Thus, the Bankruptcy Court clearly erred in finding that Goldblatt could have conspired to breach any agreement with A&W or to participate otherwise in the alleged conspiracy – just as A&W has judicially admitted. "Wrongfully and intentionally" simply does not meet the legal standard required by §523(a)(6) of "willful and malicious" required by this Court. The Bankruptcy Court's reliance on such contorted and conflicting facts is clear error as is its misinterpretation of the controlling law. It is clear that Goldblatt is entitled to discharge under §523(a)(6).

Supreme Court Authority

All circuits recognize that dischargeability under §523(a)(6) is controlled by *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998) where this Court found that:

> . . . nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e., "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit

> observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the consequences of an act," not simply "the act itself." *Id.* at 978.

The *Kawaauhau* court declared that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of §523(a)(6)" (*Id.* at 979) and affirmed the interpretation of the 8th Circuit over previous rulings of the 6th and 10th Circuits.

The Court further instructed that "when both a specific and a general provision govern a situation, the specific one controls." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992). There is no question that §523 (a)(6) is a specific provision that must be narrowly construed.

Texas Law and the Bankruptcy Court Judgment

The Bankruptcy Court excepted Goldblatt's judgment debt under §523 (a)(6) because it found conspiracy to be a willful tort. Its finding is clearly erroneous under Texas law and conflicts with previous decisions in the same court. It is further erroneous because it relies for its conclusion on state law rather than the Bankruptcy Code language and Federal authority.

Relying on *Ward v. Sinclair*, 804 S.W.2d 929, 931 (Tex. App. – Dallas 1990), writ denied), the Bankruptcy Court pointed out that:

> for a defendant to be liable for civil conspiracy to defraud, it must be shown not only that there was such a conspiracy but that the particular defendant charged agreed with one or more of the other conspirators on the claimed illegal object of the conspiracy and intended to have it brought about. [Appendix H, p. 136].

The record is clear; no such evidence exists. The Bankruptcy Court's posture effectively and impermissibly

shifts the burden of proof and alters "the balance of bankruptcy policy struck by section 523." *Chevy Chase Bank, FSB v. Briese* (*In re Briese*), 196 B.R. 440, 448 (Bankr. W.D. Wis. 1996) (quoting *Chase Manhattan Bank, N.A. v. Ford* (*In re Ford*), 186 B.R. 312, 317 (Bankr. N.D. Ga. 1995).

The Bankruptcy Court correctly concluded that civil conspiracy is an "intentional tort" but failed to analyze its essential nature as a "derivative tort." Civil conspiracy, the Bankruptcy Court recognized, can only be found in conjunction with "one or more overt unlawful acts." [Appendix H, p. 134] See *Avary ex rel. Estates of Bourgeois v. Bank of America, N.A.*, 2002 WL 442064 (Tex.App.Dallas, 2002). "Willful injury" comes from the underlying tort, not from the conspiracy itself.

The Bankruptcy Court should have realized that merely proving joint intent to engage in conduct that resulted in injury is not sufficient to establish cause of action for civil conspiracy or exception under §523. Civil conspiracy requires specific intent to agree to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996). No such finding of specific intent, unlawful purpose or Goldblatt's subjective state of mind was made by the probate court. [Appendix D, *passim*]. "The gist of a civil conspiracy is the damage resulting from commission of a wrong, which injures another, and not the conspiracy itself." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856-858 (Tex. 1968). Breach of contract is not a tort; legally, then, conspiracy to breach a contract is not conspiracy to commit a tort.

For civil conspiracy to arise, parties must be aware of wrongful conduct or harm at the beginning of the agreement. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608 (Tex.,1996). No such finding was made by the probate court. Appendix D, *passim*]. It could not have been, because the November 1993 breach of contract

happened months before the accused conspirators could have agreed on anything.

The Bankruptcy Court compounded the error of the appeals court Opinion that admitted that the trial court made no express finding of an unlawful act or resulting damages but in clear error "implied" both the act and resulting damages. [Appendix E, p. 62]. "Courts of Appeals can only 'unfind' facts, not make original findings of fact, and exceeds its authority when it implies a finding of actual damages in tort." *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986).

Northern District Bankruptcy Law

In *In re Grisham* (*Mabank Bank v. Grisham*), (N.D.Tex. 2000), 245 B.R. 65, 43 Collier Bankr.Cas.2d 1352, the court found that for purposes of the discharge exception, "willful" injury requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury, declaring that a "creditor seeking to prove 'willful' conduct within the discharge exception to willful and malicious injury must establish either an objective certainty of harm or a subjective motive to cause harm." *Id.* at 70 It reasoned that the "debtor may act deliberately or intentionally to injure a person but have just cause or excuse to do so, and in that case, debt arising from debtor's conduct would not be 'malicious' within the meaning of §523 (a)(6). *Id.* at 70.

Grisham reaffirmed that the words "and malicious" cannot be read out of the statute. *Id.* at 70. A&W's judicial admission regarding Goldblatt precludes a finding of malice either from the record of the probate court which controls and which found none or either the objective or the subjective test.

Grisham also reaffirmed the just cause exception:

> For example, a driver of an automobile deliberately swerves into a car in an adjoining lane to avoid running over a child standing in his lane. The driver

> intends to cause injury in the adjoining car to save the life of the child. The words "and malicious" cannot be read out of the statute.[20]

The *Grisham* court found that the debtor-wives did not intentionally injure the creditor and allowed their discharge. *Grisham* reasoning should apply in this case because Goldblatt could not have personally injured A&W.

Later the same year, the Bankruptcy Court for the Northern District of Texas specifically followed *Grisham* (and 5th Circuit holdings in *In re Meece*, 261 B.R. 403, (2001). The *Meece* court laid out the requirements, weaving together pre- and post-*Kawaauhau* dicta:

> A "willful" injury requires "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). To establish an intentional injury, the creditor must establish "either an objective substantial certainty of harm or a subjective motive to cause harm." *In re Miller*, 156 F.3d 598, 606 (5th Cir.1998), cert. denied, 526 U.S. 1016, 119 S.Ct. 1249, 1250, 143 L.Ed.2d 347 (1999). In addition to being willful, the injury must be "malicious." 11 U.S.C. § 523(a)(6). Malicious means "without just cause or excuse." *In re Garner*, 56 F.3d 677, 681 (5th Cir.1995). The Supreme Court in *Kawaauhau* did not collapse the malicious definition into the willful injury definition nor otherwise read the words "and malicious" out of the statute. *In re Grisham*, 245 B.R. 65, 71 (Bankr.N.D.Tex.2000). See *Meece* at 406-407.

The *Meece* Court found that while Meece intentionally infringed on Rolex trademarks, the trial court made no finding of Meece's subjective state of mind to

---

[20] See *U.S. Dept. of the Treasury v. Fabe*, 508 U.S. 491, 504, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

determine his intent, and that certain findings of the trial court precluded a finding that Meece intended to injure Rolex. It concluded that the court may not read the intent to injure requirement into the statute – precisely as the Bankruptcy Court has done in this case. *In re Meece* at 409-410.

5th Circuit Case Law

5th Circuit cases following *Kawaauhau* have not consistently followed its guidelines.

In *Texas v. Walker*, 142 F.3d 813, 126 Ed. Law Rep. 92 (5th Cir. 1998), a panel considered the intentional action of a college professor who failed to report consulting income, violating University policies, and found it to be dischargeable.

In *In re Debtor* (*Miller*), 156 F.3d 598, 48 U.S.P.Q.2d 1293 (5th Cir. 1998), the panel considered a voluntary Chapter 7 bankruptcy seeking protection from a state court judgment. The bankruptcy court declined to rest its summary judgment on §523(a)(6) because the state court jury had not decided whether Miller had inflicted a "willful and malicious injury." Miller and the creditor both appealed. The panel decided that the scope of the collateral estoppel doctrine is circumscribed by the particularized findings of the jury [or in this case, the Findings of Fact and Conclusions of Law of the probate court. See Appendix D.] See *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1379 (5th Cir. 1996). As in *Miller*, the probate court made no finding of any unlawful act by any Estate-aligned party, and made no finding as to Goldblatt's state of mind.

Following *Corley v. Delaney* (*In re Delaney*), 97 F.3d 800 (5th Cir. 1996), the *Miller* panel held that "for willfulness and malice to prevent discharge under §523(a)(6), the debtor must have intended the actual injury that resulted" and not just perform an intentional act that resulted in injury. *Id.* at 802.

The *Miller* panel reasoned that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. It noted that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts." *Kawaauhau*, 118 S. Ct. at 977. The panel avoided equating §523(a)(6) torts and intentional torts, saying ". . . . Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful." In this case, the Bankruptcy Court clearly erred by being in conflict with the *Miller* holding.

Because Miller's state court jury determined only that Miller "proximately caused" the injury, a less demanding standard than the 5th Circuit's "substantial certainty," his acts were held "not malicious" under §523(a)(6).[21]

The *Miller* panel adopted the alternative definition of "implied malice" (following *Kawaauhau* at 975) as "acts done with the actual intent to cause injury," saying, "we hold that this is the test for 'willful and malicious injury' under §523(a)(6). Thus, we hold that an injury is 'willful and malicious' where there is either an objective substantial certainty of harm or a subjective motive to cause harm." *Miller* at 606.

Because the state court findings did not speak to Miller's fraudulent intent or the objective probability of injury from tortious acts, the panel found the parties were free to try the issue for the first time and reversed and remanded. Identically, the state court findings do not speak

---

[21] The *Miller* panel followed *Vickers* in defining "malicious" as "without just cause or excuse." *Vickers v. Home Indem. Co.*, 546 F.2d 1149. 1150 (5th Cir. 1977), (quoting 1A Collier, Bankruptcy 17.17, at 1650.4 to 1650.6 (1976)) See also *Corley v. Delaney* (*In re Delaney*), 97 F.3d 800, 802 n.6 (5th Cir. 1996); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983); *Petty v. Dardar* (*In re Dardar*), 620 F.2d 39, 40 (5th Cir. 1980).

to Goldblatt's state of mind and A&W's judicial admission confirms that Goldblatt made no action at all that would sustain objection to discharge.[22]

The following year, the 5th Circuit decided in *In re Cook*, 169 F.3d 271 (5th Cir. 1999) where the bankruptcy court held that there was no evidence that Mrs. Cook participated in the activities about which the creditor complained and the creditor had abandoned its objections to Mrs. Cook's discharge. e.g., Fed. R. App. P. 28(a)(9); *Huckabay v. Moore*, 142 F.3d 233, 238 n.2 (5th Cir. 1998). The panel reversed and remanded for further proceedings consistent with the opinion regarding Mr. Cook because the bankruptcy court's findings were based on erroneous conclusions. The analogy to Goldblatt's case is obvious: There is no evidence that Goldblatt participated in the activities about which A&W complained, and A&W has admitted that Goldblatt never committed any act that could have damaged A&W.

In *Hickman v. State of Texas*, 260 F.3d 400 (5th Cir. 2001), a panel acknowledged its duty to construe exceptions narrowly in favor of the debtor while reaffirming "§523(a)(6) requires a deliberate or intentional injury." *Id.* at 405.[23] The *Hickman* court acknowledged the limited the scope of the term "willful and malicious injury" under §523(a)(6) to "conduct designed to cause deliberate or intentional injury" and not merely intentional conduct that resulted in injury. *In re Quezada*, 718 F.2d 121, 123 (5th Cir. 1983).

In re Williams, 337 F.3d 504 (5th Cir. 2003), also supports Goldblatt's position. In it, the panel determined

---

[22] *In re Caton*, 157 F.3d 1026 (5th Cir. 1998), decided after *Miller*, followed *Garner*. *In re Garner*, 56 F.3d 677 (5th Cir. 1995). The *Caton* panel found that an Illinois libel judgment against Caton was for a tort that was both intentional and without just cause or excuse and therefore non-dischargeable. *Caton's* facts are clearly inapposite to Goldblatt's case but help bring the issue into sharp focus by contrast.

[23] See also *In re Greenway*, 71 F.3d at 1180 n.8.

that §523(a)(6) did not except debts arising out of a knowing breach of contract of a collective bargaining agreement. The *Williams* panel reviewed the interpretation of §523(a)(6) *de novo* as a question of law, and cited the *Kawaauhau* court's conclusion that the provision applies to "acts done with the actual intent to cause injury," but excludes intentional acts that cause injury. *Id.* at 508. Further, the *Williams* panel cited *Miller* saying:

> a debtor must have acted with "objective substantial certainty or subjective motive" to inflict injury. *Miller v. J. D. Abrams, Inc.* (*In re Miller*), 156 F.3d 598, 603 (5th Cir. 1998). Despite similarities in the language used to describe an injury under Section 523(a)(6) and intentional torts, Section 523(a)(6) creates a narrower category of tortious conduct. *Id.* at 604 (noting, "Merely because a tort is classified as intentional does not mean that any injury caused by the tortfeasor is willful.") *Id.* at 604.

The *Williams* panel further acknowledged that the *Kawaauhau* Court rejected a broader construction of §523(a)(6) that would make debts from intentional acts that cause unintended or unanticipated injuries non-dischargeable in bankruptcy because such an interpretation would be contrary to the notion that exceptions to discharge should be confined to those plainly expressed. *Williams* at 509 (citing *Gleason v. Thaw*, 236 U.S. 558, 562, 35 S.Ct. 287, 289, 59 L.Ed. 717 (1915)). The *Williams* panel found that the *Kawaauhau* opinion seems to reject the proposition that a debt arising from a knowing breach of contract is a willful and malicious injury excepted from discharge. *Id.* at 509. The 5th Circuit position that a breach of contract may involve an intentional or substantially certain injury is apparently in conflict with the holding of this Court and is inapposite to the facts of this case because Goldblatt was never a party to any contract with A&W, and A&W has judicially admitted that Goldblatt never performed an act that could

have harmed A&W. (See *Walker*, 142 F.3d at 823; and *Miller*, 156 F.3d at 606).

The *Williams* panel held that, after *Kawaauhau*, an intentional breach of contract accompanied by tortious conduct that results in willful and malicious injury, excepts the resulting debt from discharge under §523(a)(6).[24]

In the most recent 5th Circuit case, the same panel that decided Goldblatt's case excepted discharge to lawyers who were found to have frivolously instituted proceedings for the purposes of harassment and delay. Their case is distinguishable from the facts of this case because it includes acts by the debtors intending certain harm the opposing party. See *In re Keaty*, 2005 WL 57312 (5th Cir. 2005). The *Keaty* panel, appears to place *Miller* in conflict with *Kawaauhau* by opining that "'malicious' as an act done with the actual intent to cause injury . . . . is synonymous with the definition of 'willful' and thus aggregated 'willful and malicious' into a unitary concept." *Id.* at page 5. The *Keaty* panel recognized that collateral estoppel is circumscribed by the particularized findings of the state court. While the *Keaty* findings may support exception, the findings in this case do not.

Walker, *Miller* and *Williams* (and the cases they cite) all involve fact situations in which each judgment debtor was personally involved in a direct contractual relationship with the judgment creditor but were discharged. That is not the situation here, where no such relationship ever existed between Goldblatt and the judgment Creditor, A&W. In *Keaty*, no contractual

---

[24] The case footnotes indicate that the Ninth Circuit held that "a simple breach of contract is excepted from discharge under §523(a)(6) only when it is accompanied by malicious and willful tortious conduct." See *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992) (pre-*Kawaauhau*). See also *In re Jerich*, 238 F.3d 1202, 1205 (9th Cir. 2001). In *In re Colcazier*, 134 B.R. 29, 33 (Bankr. W.D. Okl. 1991), where the Bankruptcy Court held that §523(a)(6) exempts only damages from tortious breaches of contract from discharge.

relationship existed, but the courts found a knowing act by the Keatys that was without foundation or justification.

Other Circuits' Authority

The *Miller* panel recognized that the law outside the 5th Circuit concerning the meaning of "malicious" in §523(a)(6) has long been confused.[25] It remains so with this case.

1st Circuit

In *Jones v. Svreck* (*In re Jones*), 300 B.R. 133 (1st Cir. 2003), the BAP held that Jones' sexual harassment of Svreck was non-dischargeable because of evidence that Jones actions were intentional and that he intended to harm Svreck. However, the panel distinguished the *Jones* facts from *Nolan* in which the debtor was discharged because Nolan was not the individual who engaged in the discriminatory treatment. See *Hamilton v. Nolan* (*In re Nolan*) 220 B.R. 727, 730 (Bankr. D.C. 1998). The parallel to Goldblatt's facts is unmistakable. The *Nolan* court stated that "even if Butler's behavior were found to be willful and malicious, this could not be imputed to [Nolan]. *Id.* at 731.[26] Clearly, Goldblatt's case brings the 5th Circuit squarely into conflict with the 1st Circuit.

---

[25] Citing generally *Firstmark Fin. Corp. v. Aldrich* (*In re Aldrich*), 37 B.R. 860, 862-64 (Bankr. N.D. Ohio); Charles Jordan Tabb, The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate, 59 Geo. Wash. L. Rev. 56, 61-89 (1990); Karen N. Fischer, Comment, The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice, 7 Bankr. Dev. J. 245, 248-59 (1990).

[26] The panel further distinguished *Jones* from *Voss v. Tompkins* (*In re Tompkins*) 290 B.R. 194, 199 (Bankr. W.D.N.Y. 2003) in which the judgment entered did not indicate that the underlying causes of action in the complaint were valid or had been admitted by the debtor, thus precluding application of collateral estoppel.

6th Circuit

In *In re Trantham,* 304 B.R. 298, 51 Collier Bankr.Cas.2d 961, Bankr. L. Rep. P 80,045, 2004 Fed.App. 0001P, (6th Cir. BAP 2004), a panel found that a patent infringement action created a non-dischargeable debt from malicious injury because Trantham's stated purpose in infringing the creditor's patents was to avoid paying for its technology. The panel found patent infringement, to be the "invasion of a protected interest" so that Trantham's act was willful and malicious.[27] *Id.* at 309

9th Circuit

In *Petralia v. Jercich.* 238 F.3d 1202, 1205 (9th Cir. 2001) a panel, following the 5th and 6th circuits, reasoned that Jercich had the clear ability to pay Petralia his wages, yet chose instead to use the money for his personal benefit thereby inflicting willful and malicious injury that excepted the debt.

The *Carrillo v. Su* (*In re Su*), 290 F.3d 1140 (9th Cir. 2002), panel reaffirmed *Jercich. Id.* at 1142 stating, "The subjective standard correctly focuses on the debtor's state of mind and precludes application of §523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain." *Id.* at 1146. But the panel opined that the malicious prong was separate and distinct from the willful prong of §523(a)(6). "A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Jercich*, 238 F.3d at 1209. Although the *Su* court held Su's debt to Carrillo non-dischargeable, the BAP reversed, holding that the bankruptcy court made no findings regarding malice, thereby erroneously "conflating" the "willful" and "malicious" prongs in its

---

[27] See *In re Meece*, 261 B.R. 403, 406-407 (N.D.Tex. 2001). Meece's debt was found to be dischargeable in a trademark infringement action.

BEST AVAILABLE COPY

§523(a)(6) analysis – just as was done in this case. Such holding appears to conflict with 5th Circuit law. The *Su* panel affirmed the BAP finding that "the Bankruptcy Code's legislative history makes it clear that Congress did not intend §523(a)(6)'s willful injury requirement to be applied so as to render non-dischargeable any debt incurred by reckless behavior. . . ." finding that the subjective standard correctly focuses on the debtor's state of mind and precludes application of §523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the creditor was substantially certain. *In re Su* at 1144.

10th Circuit

In *In re Moore v. Panalis*, 357 F.3d 1125 (10th Cir. 2004), the bankruptcy court ruled in favor of Moore, holding that a fraud verdict did not represent a debt for a "willful" injury under §523(a)(6). On appeal, the district court disagreed, but the 10th Circuit panel reasoned that "it does not follow that everything that happens to the victim following the commission of the tort was intended by the tortfeasor," (*Id.* at 1128) noting that "if a tortfeasor was liable for unintended injuries, [e]very traffic accident stemming from an initial intentional act – could fit the description. A 'knowing breach of contract' could also qualify. A construction so broad would be incompatible with the 'well-known' guide that exceptions to discharge 'should be confined to those plainly expressed.'" *Id.* at 1128. The *Moore* panel found that the verdict established only that Mr. Moore intended to deceive Mr. Panalis, and that the district court's analysis of the willful and malicious requirement was incomplete without correctly applying the Bankruptcy Code, stating: "The code must govern the outcome here." *Id.* at 1128. The *Moore* decision places the 10th Circuit in direct conflict with 5th Circuit.

Because the judgment debt against Goldblatt arose from the breach of contract by and between third parties – before Goldblatt ever became involved in the facts of the

case – it is unreasonable and wholly beyond the intention of the statute and the context of §523(a)(6) authorities to hold Goldblatt's debt to be non-dischargeable. In it, a substantial injustice that has been left to this Court to correct.

CONCLUSION

Every single applicable case in- and outside the 5th Circuit relating to §523(a)(6) supports Goldblatt's position that his debt is dischargeable. Not a single case holds a debt excepted from discharge by a judgment debtor who did not act directly to injure the creditor both willfully and maliciously. Because Goldblatt did not participate in any way in the original asset sale in 1991, was not involved in any way in the 1993 breach of contract, did not participate in any way in the litigation in the 352nd and 48th courts, and because the Creditor has judicially admitted that Goldblatt has never engaged in negligent, unlawful or criminal behavior toward it, this Court should reverse.

Similarly, the Bankruptcy Court's reasoning that conspiracy as an intentional tort meets the requirements of the "willful" prong of the "willful and malicious" requirements of §523(a)(6), shows clearly that the Bankruptcy Court neither fully considered nor directly addressed the section's "malicious" prong, resulting in clear and reversible error that must be corrected by this Court.

The authorities at every level and in every circuit support Goldblatt's discharge.

1) The Creditor, A&W, has judicially admitted in the bankruptcy court that Goldblatt never made any act that could have damaged it.

2) No court has ever found that Goldblatt committed any unlawful act that could have damaged the Creditor.

3) No court has ever made a finding regarding either Goldblatt's objective intention to harm the

Creditor or his subjective intent to perform any act that was substantially certain to injure the Creditor.
4) No court has ever made any finding regarding Goldblatt's subjective state of mind regarding any intent to damage the Creditor.

Instead, the record is clear that Goldblatt had a right – and therefore a legal justification – to protect himself and his investment from litigation brought by A&W as a third party with which he had no business relationship and to which he owed no duty. For these reasons, Goldblatt requests that this Court declare that the judgment debt as it pertains to Goldblatt to be wholly dischargeable under §523(a)(6) as a matter of law and to reverse and render the judgment in his favor.

Respectfully submitted,

Frank P. Hernandez
Counsel of Record
716 Wayne Avenue
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (Fax)
E-mail: fgeagle@aol.com
TCB# 09516000
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari with separate Appendix has been served on A&W Industries, Inc.'s Attorney of Record, Mr. Frank R. Jelinek, Esq. at 801 East Abram, Suite 102, Arlington, Texas 76010, on January 28, 2005, via first class mail.

Frank P. Hernandez